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According to the theory of freedom of contract, the sole purpose of contract law is to enforce the bargain made by the parties. The basic task of contract doctrine, therefore, is to determine the intent of the parties in making their agreement. The rights and duties of the parties will then be based upon this agreement. Subject to certain judicially and statutorily imposed limits, the law delegates legislative power to the contracting parties, and the terms of the contract become the law that controls the parties' rights and duties.[1] If the express terms of the contract are "the law" in a contract case, then contract doctrines consist of legal procedures to implement for the parties the bargain that they have made for themselves.

Of course, the law places certain safeguards on the bargaining process. In addition to requiring formalities such as consideration and possibly a writing, the law protects those who lack capacity or who are victims of duress or undue influence. A party to a contract may be released from a bad bargain based either on mistake or reliance on a misrepresentation. The basic philosophy commonly expressed as "you made your bed; you sleep in it," is generally applied, however, and bargains are enforced as made.[2]

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1. *See* KESSLER AND GILMORE, CONTRACTS CASES AND MATERIALS 1-15 (2d ed. 1970).

2. RESTATEMENT (SECOND) OF CONTRACTS, Chapter 11 (Introductory Note). "Contract liability is strict liability. It is an accepted maxim that *pacta sunt servanda contracts are to be kept." Id.*

A strict application of this approach when determining the nature of an employer-employee relationship requires the rights and duties of these parties to be based solely on their manifested intent. An employer's duty to continue the relationship, and conversely, an employee's right to stay employed, can only be established by the parties themselves.[3]

Theories of tort liability, in direct contrast to the theoretical "freedom" granted to contracting parties, impose external standards upon the employment relationship. Tort law generally applies societal customs, in the form of standards, to a person's conduct. Although tort duties can be found to arise from words or other voluntary acts of the parties, the basic rules of conduct that tort law imposes on individuals are based upon standards derived from the customs of the community and not from the terms of an agreement between the parties. The extent to which tort law controls the employer's right to terminate the employment relationship will be defined by looking to the values, customs, and practices of the community.

The labeling of an employee's right to be free from improper termination of employment as either a tort or a contract right can lead to quite different results. A distinct policy choice is implicit in the decision of a court to apply either one or the other doctrinal approaches. Ideally, the rights and duties of parties should not be dependent upon the label used, but a fundamental difference exists between enforcing an agreement made by the parties and applying community standards to their relationship.[4] The label that is selected has an importance distinct from the question of the measure of damages. The type of remedy available if recovery is granted is not the central concern of this article. The primary purpose of this article is to identify the method that a court should use to determine what duties are owing and how the fact of breach of those duties might be established.

HISTORICAL DEVELOPMENT OF THE EMPLOYMENT RELATIONSHIP

The relationship between employer and employee is the modern likeness of the feudal relationship of lord and serf.[5] That relationship arose out of status, which dictated the rights and duties of the parties. A person's status in life was generally fixed by birth and in most cases, was beyond the power of the individual to change. Even in the time of Blackstone, status dictated the parameters of the employment relationship. The relationship tended to be long-term and included such customary rights as that of

3. Whether one is enamored with the subjective or the objective theory of contract interpretation, the intention of the parties is still the central element for determining contract meaning and thereby defining rights and duties.

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 613 (4th ed. 1971).

5. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 123-37 (1969).

the master to discipline his apprentice for wrongdoing.

> A master may by law correct his apprentice for negligence or other misbehavior, so it be done with moderation; though, if the master or master's wife beats any other servant of full age, it is good cause for departure.[6]

Status can be defined as a relationship determined by factors over which the person has no control and can include elements such as kinship and age. Many tribal societies distributed their resources by sharing, rather than by bargaining, and a person's obligation to share rested upon that person's status.[7]

As modern contract theory developed with the coming of the industrial revolution, freedom of contract gradually replaced status as the source for determining rights and duties in employment situations. In 1861 Henry Maine wrote, "The movement of the progressive societies has hitherto been a movement from status to contract."[8] The development of the concept of freedom of contract was an essential ingredient in the rise of the capitalist economies because control of contract terms by individuals permitted free commerce and mobility of resources. Freedom of contract also provides a system of accountability for shortcomings in the production and distribution of goods and services.[9] For these reasons, freedom of contract is also viewed as an essential element in international trade.[10]

The early part of the twentieth century may have seen the zenith of both pure capitalism and pure freedom of contract in the United States. Although neither should be pronounced dead, this century has witnessed an erosion, or at least a softening, of both concepts. Societal notions of "fairness" have been imposed upon our economic system and consequently, upon our system of contract law. Before the beginning of this century, freedom of contract between employer and employee had replaced status as the basis for determining rights and duties. However, concepts analogous to status have begun to return to the employment relationship. In some contract matters, courts today are more disposed to ask "what is fair," or to submit that question to a jury. The law in our society may not

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6. 1 W. BLACKSTONE, COMMENTARIES *428.
7. E. FARNSWORTH, CONTRACTS 6 (1983).
8. H. MAINE, ANCIENT LAW 170 (1961).
9. In a conversation in December, 1983, with diplomats from the U.S.S.R., Gordon D. Schaber, Dean, McGeorge School of Law, was advised: "We read that you people may have too many attorneys. It is most interesting to note that we are developing more of them for Andropov has recently stated that we must have more precise relationship between state enterprises. Attorneys are needed to write and enforce contracts between state agencies because without enforceable contracts, one cannot fix accountability for production shortcomings." There was no discussion of the proposed remedies for failure to comply with the terms of the contracts. (Notes on file at the *Pacific Law Journal*)
10. The contracting parties' intent must not be defeated by local custom and practice. *See* 1964 U.N. Convention on Contracts for the International Sale of Goods, Art. 7-9 (Document A/Conf. 97/18, Annex I).

be satisfied with permitting the express terms, or lack of terms, in a contract to "become the law between the parties" in all cases.[11]

This new notion of fairness in the employment relationship is a significant contrast to the traditional relationship that treated even "permanent" employees as terminable at will. The freedom of contract doctrine virtually allows the dominant party in the negotiation process to dictate the terms of the agreement. The dominant position of employers commonly produced employment relationships with no guaranteed duration. Given the limited access of discharged employees to the courts, there has been an extended period in which, for practical purposes, "permanent" employment of indefinite duration meant "until someone changed his mind." This apparently is still the law in many jurisdictions including some jurisdictions that ordinarily are viewed as progressive.[12]

THEORIES TO GROUND RELIEF FOR IMPROPER TERMINATION

For purposes of discussion, several distinct theories can be identified in which an employee might be permitted to bring an action over the termination of an employment relationship.[13]

(a) An employee can sue for breach of the contract of employment. This action has heretofore generally been limited to express terms of the employment contract and to terms that can be implied using traditional common-law techniques of contract interpretation.[14]

(b) An employee who is discharged in violation of a statute that prohibits discrimination on grounds such as race, color, religion, national origin, age, and sex can maintain an action based upon a violation of that

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11. The extent to which the law between the parties to a contract may contain more than the mere intent of the parties as interpreted from their manifestations is evidenced by developments in the last three decades in these areas: (1) striking contract terms because they contravene public policy; (2) adding contract terms which are perceived to be mandated by public policy; (3) excusing performance on the basis of mistake or impracticability; (4) expanding contract defenses including misrepresentation and lack of capacity; and (5) excusing parties who did not read or could not read or lacked the ability to comprehend what they signed.

12. *See, e.g.*, Murphy v. American Home Products, 461 N.Y.S.2d 232 (Ct. of App. 1983); DeMarco v. Publix Super Markets, Inc., 384 So. 2d 1253 (Fla. 1980).

13. Actions for torts committed coincidentally to the discharge process such as slander and intentional infliction of mental distress are beyond the scope of discussion here. Note that there is some authority actually denying a right of action for conduct that would otherwise be tortious when it occurs in the course of a proper discharge. Murphy v. American Home Products, 461 N.Y.S.2d 232, 236-37 (Ct. of App. 1983).

14. Contract law traditionally requires specificity of terms such that a court can determine with reasonable certainty the fact of breach and any damages caused by the breach. Indefinite employment contracts by their nature are uncertain as to duration, future wages and benefits, job description, and proper bases for discharge. Thus, an alleged "wrongful" discharge traditionally presented issues for which the employment contract simply had no answers. *See infra* notes 54-56 and accompanying text (for modern approaches to this problem).

statute.[15] This area of law is beyond the scope of this article.

(c) An employee can maintain an action for retaliatory discharge when the employee was fired for refusing to commit a crime or for exercising a right given by the Constitution or by a statutorily created scheme enacted for the employee's benefit.[16] The retaliatory discharge theory recognizes an actionable wrong when an employee is discharged for actions such as serving on jury duty,[17] filing a workers' compensation claim,[18] refusing to give false testimony under oath,[19] or refusing to violate the antitrust laws as implemented by a consent order of a court.[20] A right of action has also been recognized when an employee is fired for the purpose of depriving him of pension rights.[21]

Not all jurisdictions recognize a right of action for retaliatory discharge. One court recently held that no cause of action results when a nurse is discharged for refusal to falsify hospital records.[22] Discharge for refusal to commit perjury in a deposition was also held not to be actionable.[23] Another recent case found no cause of action when an assistant treasurer was fired for following company procedures in reporting a fifty million dollar irregularity in the records of the employer corporation.[24]

In jurisdictions that recognize a cause of action for firing in retaliation for engaging in statutorily protected activity, a split of authority is found on whether the resulting action is in contract or tort.[25] Because the facts

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15. The availability of punitive damages under state law for a discharge that violates a statute adds to the potential damages in these cases. *See, e.g.*, Cancellier v. Federated Department Stores, 672 F.2d 1312, 1319 (9th Cir. 1982).

16. *See infra* notes 32-44 and accompanying text.

17. Nees v. Hocks, 536 P.2d 512, 516 (Ore. 1975) (jury duty); *cf.* Bell v. Faulkner, 75 S.W.2d 612, 614 (Mo. 1934) (discharge for refusing to vote as directed in a public election held not actionable).

18. Frampton v. Central Indiana Gas Company, 297 N.E.2d 425, 428 (Ind. 1973); Kelsay v. Motorola, Inc., 384 N.E.2d 353, 358 (Ill. 1979).

19. Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (1959).

20. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 178, 610 P.2d 1330, 1336, 164 Cal. Rptr. 839, 846 (1980). The potential for a treble damage antitrust recovery for discharge in retaliation for refusal to perform acts that violate antitrust laws is being litigated in Ostrofe v. H.S. Crocker Co., Inc., 670 F.2d 1378, 1383-88 (9th Cir. 1982). A divided court found that such an action could be sustained. However, the Seventh Circuit found no antitrust action in a similar case by choosing to follow the dissent of Justice Kennedy in the Ostrofe case. Bichan v. Chemetron Corp., 681 F.2d 514, 516-19 (7th cir. 1982)). The Supreme Court denied certiorai in the Seventh Circuit case (103 S.Ct. 1261), but vacated and remanded the Ostrofe decision (103 S.Ct. 1244). One might anticipate that treble damages under antitrust laws will not be available in retaliatory discharge cases.

21. Savodnick v. Korvettes, Inc., 488 F. Supp. 822, 824-27 (E.D.N.Y. 1980).

22. Hinrich v. Tranquilaire Hospital, 352 So. 2d 1130, 1131 (Ala. 1977).

23. Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1054-58 (5th Cir. 1981).

24. Murphy v. American Home Products Corp., 461 N.Y.S.2d 232 (Ct. of App. 1983).

25. The majority of jurisdictions recognizing a cause of action for a discharge that violates public policy treat it as a tort, or allow both tort and contract recovery. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176-78, 610 P.2d 1330, 1335-36, 164 Cal. Rptr. 839, 844-45 (1980); Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 428 (1973); Nees v. Hocks, 536 P.2d 512, 515-16 (1975); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1979); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980); Pierce v.

necessary to create the cause of action in retaliatory discharge cases will not vary regardless of whether the cause of action is designated tort or contract, the difference will manifest itself in the method used to compute damages, the potential availability of punitive damages, and possibly in the applicable statute of limitations.[26]

(d) Some cases now recognize a right of action for breach of an employment contract when the term breached is implied or inferred from sources such as length of employment, general company policies as evidenced in employment manuals or otherwise, evaluations or other reports pertaining to the employee in question, or other job related sources from which a finder of fact might imply contract terms.[27] This is simply a breach of contract action that could be included under (a) above, but is treated as a separate category because the source of contract terms is expanded and represents a substantial departure from traditional interpretation of employment contracts.[28]

(e) Recovery in tort or in contract by a discharged employee has been permitted where the court found a breach by the employer of an implied covenant of good faith or of good faith and fair dealing.[29]

(f) At least some members of the plaintiffs' bar are advocating that

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Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980); Campbell v. Eli Lilly and Co., 413 N.E.2d 1054 (Ind. App. 1980) (no cause of action found); Harless v. First National Bank in Fairmont, 289 S.E.2d 692 (W.Va. 1982); Reuther v. Fowler, 386 A.2d 119 (Pa. 1978). But many jurisdictions limit the action to contract theories and damages. *See, e.g.*, Brockmeyer v. Dunn & Brad Street, 335 N.W.2d 834 (Wis. 1983) (limits the employee's remedies to reinstatement and back pay); Monge v. Beebe Rubber Co., 316 A.2d 549, 552 (N.H. 1974); Bottijliso v. Hutchinson Fruit Co., 635 P.2d 992 (N.M. 1981); *see also* Fortune v. National Cash Register Co., 364 N.E.2d 125 (Mass. 1977) (contract action for breach of implied covenant of good faith); Murphy v. American Home Products Corp., 461 N.Y.S.2d 232 (Ct. of App. 1983) (dissenting opinion); Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1 (5th Cir. 1977); Catania v. Eastern Airlines Inc., 381 So. 2d 265 (Fla. App. 1980). Other jurisdictions have not yet recognized any cause of action for a discharge that violates public policy. Some of these jurisdictions resist application of a judicially conceived tort remedy by stating that creation of such a remedy is better left to the legislature. *See, e.g.*, Dockery v. Lampart Table Co., 244 S.E.2d 272, 276 (N.C. 1978); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 877 (Miss. 1981). *But cf.* Stephens v. Justiss-Mears Oil Co., 300 So. 2d 510, 511 (La. App. 1974) (avoids application of public policy doctrine by sharply distinguishing the facts). This resistance to allowing tort damages arising out of a retaliatory discharge arises in other contexts. For example, Hudson v. Zenith Engraving, 259 S.E.2d 812 (S.C. 1979) held that a discharge in retaliation for filing a worker's compensation claim did not constitute "outrageous conduct" for the tort of intentional infliction of emotional distress. In addition, this jurisdiction does not recognize a public policy exception. *See also* Palmateer v. International Harvester Co. 406 N.E.2d 595 (Ill. App. 1980) (jurisdiction recognizing public policy exception).

26. Many jurisdictions provide different limitation periods for the commencement of contract actions and tort actions. *See, e.g.*, CAL. CIV. PROC. CODE §§337(1) (four year period for contract actions), 340(3), 304, 305 (one year period for most tort actions).

27. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981).

28. The difference between interpreting an employment contract using traditional standards as distinguished from an expanded view of available sources of contract terms is vividly demonstrated by comparing the majority and dissenting opinions in Southwest Gas Corp. v. Ahmad, 668 P.2d 261 (Nev. 1983).

29. *See infra* notes 74, 98 and accompanying text.

courts recognize a new tort which might be called wrongful discharge.[30]

ACTIONS BASED UPON RETALIATORY DISCHARGE

When a statutory policy operates to the specific benefit of an employee, a discharge in retaliation for exercising the statutory right has been found to be actionable.[31] In a distinct but analogous circumstance, a right of action has been found to arise from a discharge in retaliation for an employee's refusal to commit a crime or violate a lawful court order.[32] Retaliatory discharge has also been declared a valid cause of action when the employee was fired for exercising a fundamental constitutional right or duty.[33]

Once a cause of action can be established for discharge in retaliation for conduct protected by a statutory scheme, this right might appear to be easily extended to any case involving a well-recognized or easily identified public policy. Numerous examples of judicially recognized public policy could be identified. Many statutory schemes are also designed for the public good, rather than for the specific benefit of a class of which the employee is a member. Most jurisdictions that have granted causes of action for retaliatory discharge, however, have refused to extend the concept beyond the three categories listed above: (1) exercise of rights granted by statutes enacted for the benefit of employees; (2) refusal to commit a criminal act; and (3) exercise of a constitutional right or duty.

In many jurisdictions one can track an interesting tug and pull on this issue. The State of Indiana, as with most jurisdictions, starts with the premise that an employment contract for an unspecified time is terminable-at-will at the election of either party.[34] When the court finds a statutory policy that operates to the specific benefit of the employee, however, a discharge in retaliation for exercising the statutory right is held to be actionable. In *Frampton v. Central Indiana Gas Co.*,[35] a cause of action was found to arise from the discharge of an employee in retaliation for filing a workers' compensation claim. Subsequent cases have presented the Indiana

30. The issue whether facts exist to support a finding of "wrongful discharge" has been presented to juries in trial court cases such as Norton v. Kaiser Steel Corp. (filed March 19, 1981, no. 202088, Calif. Super. Ct., San Bernardino County). There does not appear to be any basis in the reported opinions for finding a separate and distinct cause of action for "wrongful discharge" nor to identify it as one based in tort or contract.

31. Hentzel v. Singer Company, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982); *see infra* notes 36, 38 and accompanying text.

32. Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330 (1980); *cf.* Hinrich v. Tranquilare Hospital, 352 So. 2d 1130 (Ala. 1977).

33. Nees v. Hocks, 536 P.2d 512 (Ore. 1975).

34. Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973).

35. *Id.*

courts with opportunities to expand the basis for a retaliatory discharge action. In *Campbell v. Eli Lilly & Co.*,[36] however, the appellate court denied relief to an employee discharged in retaliation for cooperating with the Food and Drug Administration in its inquiry concerning the employer's products. The holding of the case made clear that even the presence of a state interest defined by statute or common law that would be defeated if the discharged employee were denied a right of action was not sufficient to induce the Indiana court to expand *Frampton*. The dissent in this case, however, was convinced that a right of action should exist for discharge that contravenes any clearly established public policy.

In a comparable sequence of cases, Illinois courts have taken a more expansive view of retaliatory discharge. In *Kelsay v. Motorola, Inc.*,[37] the Illinois Supreme Court recognized a cause of action arising from a discharge in retaliation for the filing of a workers' compensation claim. A divided court in *Palmateer v. International Harvester Co.*[38] extended this tort action to an employee who was discharged in retaliation for giving information to the police indicating that a fellow employee had engaged in criminal activity. The public policy that needed to be protected was the benefit to society that inheres in citizens cooperating with law enforcement agencies.

Another line of case law that is interesting to track in pursuit of the parameters of retaliatory discharge actions is the case law dealing with discharges of employees who reported conditions that violated standards relating to product safety or environmental protection laws. Cases have distinguished between employees whose jobs involved preventing or reporting such conditions and those employees whose jobs did not.[39] Conversely, cases do not support a distinction based upon whether employees expressed their concerns within established or authorized channels of communication in the company or "went public" with their information or charges.[40] Obviously, societal concerns are involved in these cases that may have a significance comparable to the issue of individual employee

36. 413 N.E.2d 1054 (Ind. App. 1980).
37. 384 N.E.2d 353 (Ill. 1979).
38. 421 N.E.2d 876 (Ill. 1981).
39. *See* Geary v. United States Steel Corp., 319 A.2d 174, 178-79 (Pa. 1974); Sheets v. Teddy's Frosted Foods, 427 A.2d 385, 388 (Conn. 1980); *see also* Blades, *Employment at Will vs. Individual Freedom*, 67 COLUM. L. REV. 1404, 1408 n.22 (1967).
40. A cause of action has been denied when a termination was in retaliation for the employee giving a newspaper information about the employer's misconduct (Boniuk v. New York Medical College, 535 F. Supp. 1353 (1982)); but allowed when the employee was fired for reporting crimes of fellow employees to the police (Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981)). However, no public policy was found to have been violated when the termination was for telling superiors of an unsafe product (Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. App. 1980)) nor when the employee was fired for writing a letter critical of the employer to a state agency even though the letter contained untrue statements (Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978).

job security.

In a recent California decision,[41] a complaint was found sufficient to state a cause of action for retaliatory discharge when state statutes appeared to protect the specific activity for which the employee was allegedly discharged. The facts alleged discharge in retaliation for demanding a smoke-free environment in which to work. The opinion indicates that the public policy upon which a retaliatory discharge can be based must be predicated upon statute. The court held that state statutes that require safe working conditions can be interpreted to give employees the right to seek correction of unsafe conditions. Thus, these statutes create the potential, on retrial, for finding a retaliatory discharge in violation of statutorily created policy.[42]

A right of action for retaliatory discharge was first recognized in California in *Petermann v. Int'l. Brotherhood of Teamsters.*[43] In that case, a business agent was fired for refusing to commit perjury on demand of the employer.[44] The opinion in the *Petermann* case did not indicate whether the cause of action is in tort or contract, but in 1980 the California Supreme Court declared that retaliatory discharge gives rise to a tort action.[45] Decisions in other jurisdictions are split on this point.[46]

The right and duty recognized in retaliatory discharge cases are not dependent upon the manifested agreement of the parties and cannot be abrogated by the employment contract.[47] Although this would not preclude treating the right of action for retaliatory discharge as an implied-in-law contract term, the obligation is actually one that is imposed by community standards and placed upon an employer without regard to other terms of the employment contract. The right arises from the status of the individual as an employee and the action is thus better categorized as a tort.[48]

Issues involving the scope of the employee's right and the appropriate remedy to apply may also be more comfortably handled if the action is one in tort. The absence of any express or implied agreement concerning

41. Hentzel v. Singer Company, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).
42. *Id.* at 296-97.
43. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).
44. *Id.* at 187, 344 P.2d at 26.
45. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).
46. *See supra* note 26.
47. In a retaliatory discharge action, proof of the existence of an employer-employee relationship is necessary to establish the status of the parties from which the law finds the right not to be fired in retaliation for engaging in protected activities. The terms of the employment contract as to salary or wage must also be shown to provide a measure of damages. A term in the employment contract that purported to exculpate the employer from liability for retaliatory discharge would be unenforceable. *See, e.g.*, Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).
48. *See Tameny* 27 Cal. 3d at 177, 610 P.2d at 1340, 164 Cal. Rptr. at 845; *see also supra* notes 5-8 and accompanying text.

duration and other future terms in the employment contract may present obstacles if the action is based in contract.[49]

ACTIONS BASED UPON EXPANDED CONTRACT INTERPRETATION THEORIES

Actions for breach of contract brought by employees against employers for wrongful discharge do not represent a new cause of action. No one questions the right of an employee to enforce an express or an implied-in-fact contract term that is breached by a wrongful discharge. In the cases involving employment of indefinite duration, however, this breach of contract theory has been difficult to develop because of common-law[50] and statutory assumptions[51] that the relationship is terminable-at-will. This interpretation is a stumbling block to a contract action for improper discharge based upon implied terms in the employment contract. A second problem arises out of the traditional requirement of a high degree of certainty of terms in a bargain before the bargain will be legally enforceable.[52]

A number of courts have rendered decisions that have overcome these obstacles. One fundamental step that a court must take to accomplish this result is to expand the sources of contract terms beyond the traditional direct communications between the employee and employer at the time of hiring or in other formal dealings relating to terms of employment. Agreements may be "shown by the acts and conduct of the parties, interpreted in the light of the subject matter and the surrounding circumstances."[53] Employee manuals, handbooks, or other company generated documents describing or defining terms and conditions of employment or employ-

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49. *See infra* note 53 and accompanying text.

50. Martin v. New York Life Ins. Co., 42 N.E. 416, 417 (1895); Parker v. Borock, 182 N.Y.S.2d 577, 579, 156 N.E.2d 297, 298 (1959); Payne v. Western & Atlantic R.R. Co., 81 Tenn. 507, 519-20 (1884) (overruled on other grounds); Hutton v. Watters, 179 S.W. 134 (1915); Marin v. Jacuzzi, 224 Cal. App. 2d 549, 553, 36 Cal. Rptr. 880, 883 (1964); Ruinello v. Murray, 36 Cal. 2d 687, 227 P.2d 251 (1951).

51. *See, e.g.*, CAL. LAB. CODE §2922.

52. Contract damages must be established with reasonable certainty. Failure to establish with certainty all of the damages that will be sustained would not completely preclude recovery but will cause the plaintiff to lose those items of damages which cannot be established with certainty. Damages for lost wages are somewhat analogous to lost profit claims. Those elements of damage that can be established with certainty will be recovered, but the trier of fact will not be permitted to speculate. Thus a wrongfully discharged plaintiff might use the rate of pay in existence at the time of discharge and the position held at the time of discharge as a base for measuring damages, but under traditional contract damage rules, the employee could not argue the prospects of higher rank and rate of pay as a basis for future damages. Contrast this with computation of lost future wages in a wrongful death case, for example, and one can see immediate advantages to the plaintiff if a cause of action can be stated in tort.

53. Marvin v. Marvin, 18 Cal. 3d 660, 678 n.16, 557 P.2d 106, 118, n.16, 134 Cal. Rptr. 815, 827 n.16 (1977).

ment practices can provide implied terms of employment contracts.[54] Company statements can be incorporated into employment contracts even when they were not presented to the employee or produced by the company until after the establishment of the employment relationship. Procedures for discipline or discharge have been found to become part of the terms of an employment contract even when the provisions of the company's "Employee Information and Benefits Handbook" were apparently unknown to the employee until after the discharge.[55]

Although finding contract terms to be based upon such non-negotiated and even uncommunicated provisions may be viewed as a significant departure from established principles of contract law,[56] an analogous practice is accepted in labor law. The terms of a collective bargaining agreement become the basis of employment contracts between management and a newly hired employee without the benefit of any negotiation or discussion of the subject, or any requirement that the employee have express knowledge of the terms. Similarly, a party may enter a contract, such as a fire and casualty insurance policy, and acquire various rights and duties without any negotiation or any clear notion of the precise terms of the agreement. Other sources of implied terms or inferred terms in em-

54. Yartzoff v. Democrat-Herald Publishing Co., Inc., 576 P.2d 356 (Ore. 1978); Southwest Gas Corp. v. Ahmad, 668 P.2d 261 (Nev. 1983); Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *see* Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

55. *See* Southwest Gas Corp. v. Ahmad, 668 P.2d 261 (Nev. 1983). Faculty handbooks can likewise be found to be part of an employment contract. *Id.*; Miles College, Inc. v. Oliver, 382 So. 2d 510, 511 (Ala. 1980); Sawyer v. Mercer, et. al., 594 S.W.2d 696, 697 (Tenn. 1980). In a somewhat comparable situation, students can be found to have contract rights with the schools that they attend based in part upon terms contained in a school publication such as a catalog. University of Miami v. Militana, 184 So. 2d 701, 704 (Fla. 1966); Eden v. State of New York, 426 N.Y.S.2d 197 (1980); Lexington Theological Seminary, Inc. v. Ottie David Vance, 596 S.W.2d 11 (Ky. App. 1979); *cf.* Abrams v. Illinois College of Podiatric Medicine, 395 N.E.2d 1061 (Ill. 1979).

56. One issue that can create problems in court opinions relates to the time at which a contract of employment is made. The more conservative opinions are typically written from the assumption that the employment contract was entered into prior to or on the first day of the commencement of the employment relationship. Matters not discussed or even known by one or both parties on that date thus are not part of the contract terms. A subsequently developed or distributed employee manual or other statement of employment policy thus has rough sledding trying to gain admittance into the inner circle of contract terms because these would be typically disseminated as a unilateral act of the employer and would not be the subject of "negotiation" between the employer and the employee in question. This point is stressed, for instance, in the dissent in *Southwest Gas Corp.*, 668 P.2d 261 (Nev. 1983). Those decisions which take a more broad view of employment contract terms can usually be seen to operate from the assumption that the final statement of the relationship between this particular employer and employee need not be manifested on the first day they entered the employment relationship. The originally indefinite contract began to take on more detailed terms and conditions as the relationship grew. A manual distributed by the boss and initially left unread by the employee will eventually become an established term of their contract after the manual and the relationship continued to coexist for a period of time. Only when viewed as an agreement which is undergoing rather constant modification can an employment contract be understood to contain terms based on such thing as assurances, longevity, and general practices and policies of the employer and the industry. *See infra* note 58.

ployment contracts can include the duration of employment, promotions received, lack of direct criticism of work, assurances given to the employee, and the acknowleged policies and practices of the employer.[57]

ACTIONS BASED UPON BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

In California, courts have recognized the existence of an implied covenant of good faith and fair dealing in contract obligations.[58] The question is whether and in what circumstances this implied covenant can be the source of substantive rights. Numerous decisions have interpreted contract rights and duties by applying a standard of good faith. For example, sellers of goods who are authorized to set the contract price are required to set that price in good faith.

In the case of *Comunale v. Traders & General Ins. Co.*,[59] California courts permitted a tort action to be brought against an insurance carrier for violation of the covenant of good faith and fair dealing implied in the contract of insurance. This theory has been developed in numerous cases against insurance carriers in California[60] and in other jurisdictions.[61] The question that remains unanswered is whether this new tort action will be extended to contracts of employment.[62]

The author has located two California appellate cases that find a cause of action in tort for breach of a contract duty of good faith and fair dealing

57. *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d. 311, 327, 171 Cal. Rptr. 917, 925-26 (1981). The thoughtful imagination brought to bear on finding a wide range of sources for implied and inferred terms of employment contracts may reach its zenith when the courts face the question of how properly to dispose of the constructive discharge cases that are certain to come in the near future. Employees who quit because they do not receive the cost of living raises or benefit enhancements that are afforded to their colleagues or who are reassigned to less desirable jobs or work stations can be expected to claim that they were forced into involuntary resignations. *See* R. BAXTER & J. FARRELL, CONSTRUCTIVE DISCHARGE – WHEN QUITTING MEANS BEING FIRED, EMPLOYEE RELATIONS LAW JOURNAL 7(3), 346-68 (1981-82).

58. *E.g.*, Vale v. Union Bank, 88 Cal. App. 3d 330, 151 Cal. Rptr. 784 (1979); Wagner v. Benson, 101 Cal. App. 3d 27, 161 Cal. Rptr. 516 (1980). *But cf.* Witt v. Union Oil Co. of California, 99 Cal. App. 3d 435, 160 Cal. Rptr. 285 (1979) (covenant not implied against express terms of contract or to supply a term on a matter as to which contract is intentionally silent).

59. 50 Cal. 2d 654, 328 P.2d 198 (1958).

60. *E.g.*, Johansen v. California State Auto. Assn., 15 Cal. 3d 9, 538 P.2d 744, 123 Cal. Rptr. 288 (1975); Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974); Austero v. National Cas. Co. of Detroit, Michigan, 84 Cal. App. 3d 1, 148 Cal. Rptr. 653 (1978).

61. *See, e.g.*, Mitchell v. Intermountain Casualty Co., 364 P.2d 856 (N.M. 1961); Bibeault v. Hanover Insurance Co., 417 A.2d 313, 319 (R.I. 1980). *But cf.* D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co., 431 A.2d 966, 970 (Pa. 1981).

62. "While breach of the implied covenant of good faith and fair dealing may give rise to a cause of action sounding in tort in the insurance field (citing cases), we are not aware of any appellate court case, and none has been cited, extending that principle to other contractual relationships." Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co., 66 Cal. App. 3d 101, 135 n.8, 135 Cal. Rptr. 802, 822 n.8 (1977).

arising from a contract other than an insurance contract. Both are court of appeal decisions rendered in the Los Angeles District and neither is founded on any statutory authority or case holding outside of the insurance field. *Cleary v. American Airlines*,[63] discussed in the next section, is a discharge case that finds a tort relying exclusively on cases involving insurance carriers and their insureds.[64] The second case is *Smithers v. Metro-Goldwyn-Mayer Studio, Inc.*[65]

The *Smithers* case involves a demand by Metro-Goldwyn-Mayer that one of the stars of a TV series, Smithers, accept an MGM dictated modification in the terms of an existing contract. An official of MGM advised Smithers' agent that if Smithers did not accept the modification, MGM would be "hard pressed to use Mr. Smithers again" and might also get CBS to agree not to hire Mr. Smithers in the future.[66] Based upon these facts, the trial court submitted to the jury the issue of tortious breach of an implied covenant of good faith and fair dealing, and the appellate court affirmed the resulting judgment.

The case upon which the *Smithers* decision appears to place primary reliance is *Sawyer v. Bank of America*.[67] Although *Sawyer* contains dicta that the *Smithers* court found useful,[68] *Sawyer* actually reversed a trial court judgment that awarded damages on a tort theory for breach of an implied covenant of good faith and fair dealing. *Sawyer* cited two cases in support of its broad dicta. Each of those cases identified a covenant of good faith and fair dealing but utilized that covenant not as a substantive right but simply as a means for interpretation.

One of the cases cited in *Sawyer*, *Berkeley Lawn Bowling Club v. City of Berkeley*,[69] is a case in which the defendant city was enjoined from changing the use of the land on which bowling greens were located. The city historically had maintained the greens and an adjoining lawn bowling clubhouse. The city rented the clubhouse to plaintiff for twenty years to be used exclusively as a bowling green clubhouse. Approximately nine years later, the city announced plans to discontinue bowling on the greens. The issue before the court concerned the question whether implied promises were present in a contract of this nature. The trial court found an implied promise by the city to continue operating the two bowling greens, and the

63. Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).
64. *See infra* notes 74-76 and accompanying text.
65. Smithers v. Metro-Goldwyn Mayer, 139 Cal. App. 3d 643, 189 Cal. Rptr. 20 (1983).
66. *Id.* at 648, 189 Cal. Rptr. at 20.
67. Sawyer v. Bank of America, 83 Cal. App. 3d 135, 145 Cal. Rptr. 623 (1978).
68. "[T]he tort of breaching an implied covenant of good faith and fair dealing consists in bad faith action, extraneous to the contract, with the motive intentionally to frustrate the obligee's enjoyment of contract rights." *Id.* at 139, 145 Cal. Rptr. at 625.
69. 42 Cal. App. 3d 280, 116 Cal. Rptr. 762 (1974).

appellate court affirmed, stating that every contract contains an implied covenant of good faith and fair dealing. That covenant imposes the duty on both parties to do everything that the contract presupposes that they will do to accomplish its purpose. The critical promise implied in the agreement was the promise of the city to continue operating the lawns so that the clubhouse operation would be profitable. The implied good faith covenant was not analytically necessary to allow the court to find the substantive promise.

The second case relied upon by *Sawyer* for its dicta is *Brewer v. Simpson.*[70] This case involves the enforcement of a contract between a childless husband and wife to make mutual wills giving the survivor rights to the whole of each of their estates and splitting the property equally among collateral relatives upon the death of the survivor. After the death of the husband, the wife attempted to convey property subject to the contract to her second husband without adequate consideration and in frustration of the relatives' expectancies. In holding that the wife could not breach her contract in this fashion, the court made the statement that her contract obligations were subject to an implied covenant of good faith and fair dealing.[71] This statement was apparently made for the sole purpose of supporting the court's determination that the contract in question contained an implied promise not to dispose of the property in a manner that would defeat the express promises that the parties had made.

Other cases can be cited to support the proposition that a contract obligation includes a covenant of good faith and fair dealing. These cases, however, as in *Berkeley Lawn Tennis Club* and *Brewer*, involve interpretation of contract obligations and use the good faith and fair dealing analysis to support a finding of other implied contract promises, which could be implied with or without resort to the language of "good faith and fair dealing."[72]

TWO CALIFORNIA CASES: ALTERNATIVES FOR TOMORROW'S CASELAW

As the courts grapple with the proper course of the law relating to em-

70. Brewer v. Simpson, 53 Cal. 2d 567, 349 P.2d 289 (1960).
71. *Id.* at 588-89, 349 P.2d at 300.
72. *See, e.g.*, Universal Sales Corp. v. Cal. etc. Mfg. Co., 20 Cal. 2d 751, 128 P.2d 665 (1942); Schoolcraft v. Ross, 81 Cal. App. 3d 75, 146 Cal. Rptr. 57 (1978); *cf.* Wood v. Lucy, Lady Duff Gordon, 118 N.E. 214 (1917). So long as an implied covenant of good faith and fair dealing constitutes simply a basis for finding or construing other contract terms, it can be and has been used in a somewhat off-hand, nontechnical fashion in contract cases. If this implied covenant is to be elevated to the status of being the one contract term the breach of which gives rise to an intentional tort with a punitive damage potential, its use and meaning in court opinions takes on far greater significance. Under these circumstances, it is questionable what significance can be placed upon the appearance of this language as an aid to interpretation in decisions rendered before the tort theory of bad faith was invented.

ployee discharges, two cases that present an interesting contrast will be considered. In *Cleary v. American Airlines*,[73] an eighteen year employee was allegedly discharged for theft, leaving his work area, and threatening another employee. Mr. Cleary's complaint alleged that he had an oral contract with American Airlines for permanent employment and that the terms of his contract included the employer's formal personnel regulations, which contained policies and procedures relating to employee discipline and discharge. Plaintiff's discharge was allegedly carried out without an opportunity for the fair, impartial, and objective hearing prior to discharge that was expressly required by the company regulations. The plaintiff alleged his discharge to be wrongful and without just cause, but judgment was entered for the defendant after the court sustained the demurrer to the fifth amended complaint.

Justice Jefferson of the Second District found that Cleary had stated a cause of action that sounded in both tort and contract. The Justice identified two facts that he stated to be of paramount importance in reaching this result. The first of these was the simple fact that plaintiff had worked for the defendant for eighteen years. The court stated that termination without legal cause after eighteen years of employment offends the implied-in-law covenant of good faith and fair dealing contained in all contracts.[74] Cases from the insurance field were cited and quoted. The second factor that the court discussed was the employer's express policy concerning dismissal procedures. Allegations of failure to follow those procedures were stated to be a basis for a cause of action in both contract and tort. The court thus recognized a tort cause of action for the contract breach.[75]

Although cases with dual holdings are always subject to reinterpretation, the clear direction from *Cleary* is that long term employees, as a matter of law, have a right not to be fired without legal cause, and that the bad faith cases from the insurance field are applicable to employee discharges. If this is the law, then Cleary's tort rights cannot be affected by any express terms of his employment contract.

The second case, which poses the alternative approach, is *Pugh v. See's Candies*.[76] Prior to the *Pugh* decision, the California Supreme Court had handed down the decision in *Tameny v. Atlantic Richfield Co.*[77] *Tameny* involved an employee who allegedly was discharged for his refusal to par-

73. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).
74. *Id.* at 455, 168 Cal. Rptr. at 729. The court, at 423, 168 Cal. Rptr. at 728, cites Coats v. General Motors Corp., 3 Cal. App. 2d 340, 39 P.2d 838. The *Coats* case used the term "good faith" in analyzing the implied-in-fact term of duration violated by termination of an employee. *See supra* note 73 and accompanying text.
75. 111 Cal. App. 3d at 453, 168 Cal. Rptr. at 729.
76. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).
77. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

ticipate in conduct that would constitute a violation of the Sherman Antitrust Act, the Cartwright Act, and a federal court consent decree entered in a prior case against Atlantic Richfield. The complaint alleged three causes of action in tort designated as (1) wrongful discharge, (2) breach of an implied covenant of good faith and fair dealing, and (3) interference with contractual relations. A fourth cause of action was alleged for breach of contract. The trial court sustained demurrers to the three tort causes, but overruled the demurrer on the contract action. The plaintiff then voluntarily dismissed his contract action and appealed the judgments entered against him on the tort theories.[78]

The issue squarely before the California Supreme Court in *Tameny* was whether an action in tort or contract would lie. Atlantic Richfield conceded that an allegation of firing for refusal to commit a crime states a cause of action under the *Petermann* case, but took the position that the cause of action was in contract and not in tort. Speaking for a majority of the Supreme Court, Justice Tobriner held that the discharge of an employee for refusal to commit a crime gives rise to a cause of action in tort.[79] This was the first clear resolution of the issue left open in *Petermann* as to whether a firing in violation of public policy presented a cause of action sounding in tort or contract.

In addition to declaring a retaliatory discharge case to lie in tort as well as in contract, the *Tameny* decision is noteworthy for its statement that punitive damages could be available. This is alluded to in the text of the opinion and developed further in a footnote.[80] Although the possible availability of punitive damages in wrongful discharge cases has caused concern among employers, the conclusion of the court does not appear surprising. If a retaliatory discharge case gives rise to a cause of action in tort, it is an intentional tort and no logical basis exists for contending that punitive damages should not be available if the facts support them.

The other significant aspect of the *Tameny* case is dicta that implies a relaxation of the *Petermann* rule, limiting actions for retaliatory discharge based on violations of public policy to violations of statutorily expressed public policy. The *Tameny* decision cites nonemployment cases applying *judicially* conceived public policy and then states, "In light of the foregoing authorities, we conclude that an employee's action for wrongful discharge is *ex delicto* and subjects an employer to tort liability."[81] The "foregoing authority" includes two cases. The first finds tort liability for the retaliatory eviction of a tenant for exercising his right to repair and de-

78. *Id.* at 171, 610 P.2d at 1332, 164 Cal. Rptr. at 841.
79. *Id.* at 175-76, 610 P.2d at 1334-35, 164 Cal. Rptr. at 843-44.
80. *Id.* at 176-77, 610 P.2d at 1335, 164 Cal. Rptr. at 844-45.
81. *Id.*

duct. The second finds tortious conduct by a milkman arising out of negligently performing his contractual duty to deliver milk. Read narrowly, the *Tameny* case stands for the proposition that a tort cause of action is available in cases involving discharge for refusal to commit a criminal act. However, the case contains language that could be read broadly to hold that a tort cause of action extends to *all* firings in violation of judicially recognized public policy.

In a two sentence concurrence, Justice Wiley Manuel refused to adopt the language basing the decision on broad notions of public policy, stating:

> In my view the cause of action here in question flows from a clear statutory source - i.e., the provisons of §2856 of the Labor Code. Accordingly, I see no reason to search further for it among the vague and ill-defined dictates of "fundamental public policy."[82]

Following the *Cleary* and *Tameny* decisions, *Pugh v. See's Candies*[83] was decided by the Court of Appeal for the First District. Although the *Cleary* decision had alternative bases for its holding, and although the expansive language in *Tameny* was dicta, the two cases certainly presented a path to the development of tort remedies for all improper employee discharges, if not the creation of a new tort that might be styled as "wrongful discharge."[84]

The *Pugh* case involves an individual who began work for the See family's company in 1941 as a dishwasher and worked his way up to vice president in charge of production with a seat on the board of a subsidiary of the defendant corporation. Pugh had been frequently told, "If you are loyal to See's and do a good job, your future is secure."[85] Laurance See, the president, had a policy of not terminating administrative personnel except for good cause, and this practice was carried on by his successor, Charles B. See. No formal or written criticism was ever made of Pugh's work. In 1968, a Mr. Huggins wanted Pugh fired because Pugh had supported the position of the primarily female seasonal workers in the union negotiations, but Mr. See overruled Mr. Huggins, and Pugh never learned of that event. Pugh was promoted in 1971 and received a gold watch in 1972. Thereafter, the See family sold its corporations to Blue Chip Stamps, and Huggins became president. Huggins asked Pugh to serve on the negotiating team for

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82. *Id.* at 179, 610 P.2d at 1337, 164 Cal. Rptr. at 846.
83. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).
84. *See supra* note 31 and accompanying text.
85. The facts summarized herein from the *Pugh* opinion can be found at 116 Cal. App. 3d at 315-19, 171 Cal. Rptr. at 918-20 (1981).

renewal of the union contract. Pugh expressed concern by stating that he would like to serve but had heard that See's had a "sweetheart contract" with the union, and a different negotiator was found. In the spring of 1973, Pugh and Huggins toured Europe with their wives to inspect candy making operations. Upon their return, Huggins summarily fired Pugh without giving any explanation or granting any severance pay.

Mr. Pugh sued, alleging *inter alia*, that he was fired for refusing to engage in the negotiation of an illegal collective bargaining agreement and for refusing to engage in sex discrimination. These allegations were made in an attempt to bring the case within the principles enunciated in *Petermann* relating to retaliatory discharge.[86] Pugh also alleged breach of an implied-in-fact contract. See's obtained judgment without a trial on the merits and Pugh appealed.

Because *Tameny* was decided while *Pugh* was on appeal, the appellate court in *Pugh* was called upon to analyze *Tameny* and interpret its dicta. Justice Grodin wrote the opinion of the court, stating that *Tameny* provides a tort remedy for discharge based upon refusal to commit a crime, and for discharge in violation of statutorily created public policy. However, the court found that Pugh's allegations did not bring him within this category despite the efforts to characterize his discharge as retaliatory for refusing to participate in illegal activities. Although the decision on this point indicates that the facts alleged were insufficient to justify a conclusion that See's was asking Pugh to break the law, or that See's fired Pugh for refusing to do so,[87] the appellate court reversed the judgment that had been entered in favor of See's and remanded the case for trial. The critical point in the opinion involves the bases upon which the case was to be tried and presented to the trier of fact. *Cleary* presented authority for a tort theory that would permit the plaintiff to present a case based upon violation of the implied covenant of good faith and fair dealing. The *Cleary* opinion states that termination of an eighteen year employee without legal cause offends the implied-in-law covenant of good faith and fair dealing.[88] Language from *Tameny* could also have supported a tort theory in *Pugh* even without solid allegations of retaliatory discharge.[89] A step within apparent reach of the court would have been to direct that a tort of "wrongful discharge" was the issue to present to the trier of fact.

Instead, Justice Grodin's opinion directed the trial court to determine whether See's had violated an implied-in-fact contractual promise not to

86. Discharge in retaliation for refusal to commit a criminal offense. *See supra* note 80 and accompanying text.
87. 116 Cal. App. 3d 311, 322; 171 Cal. Rptr. 917, 922 (1981).
88. *See supra* note 73 and accompanying text.
89. *See* 27 Cal. 3d 167, 177, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 845 (1980).

dismiss Mr. Pugh except for good cause. The plaintiff was *not* given a tort theory to develop. The trial court was not instructed to determine whether See's had violated a covenant of good faith and fair dealing.[90]

If Justice Jefferson had been promoted to the Supreme Court, or if Justice Tobriner had remained on the court, one might consider the dicta in *Tameny* and the tort theory in *Cleary* to express the evolving California law on this subject. But since Justice Grodin is now on the high court, it becomes significant that in the *Pugh* opinion, Grodin limited the tort found in *Tameny* to only those cases within the *Petermann* line. Grodin refused to permit Pugh to take his case to the jury on any tort theory, thus rejecting the position taken by the court in *Cleary*.

Two recent employee dismissal cases appear to support an interpretation of the *Pugh* case rejecting a broader application of recovery in tort. In *Walker v. Northern San Diego County Hospital District*,[91] the court discusses the source of plaintiff's alleged contract rights and the due process protections owing to the employee from the public agency defendant. In remanding the case for retrial, the court did not mention either a tort theory or any right to present a tort issue to the jury. The second recent employee dismissal case is *Hentzel v. Singer Company*,[92] decided in December 1982 in an opinion by Justice Grodin, who was then still on the appeals court. Hentzel was a staff attorney who did patent work for Singer. Hentzel alleged that he was fired because he had complained to Singer about the failure of the company to provide him with a smoke-free atmosphere in which to work. In addition to alleging a firing in retaliation for trying to obtain a healthier work environment, Hentzel alleged that Singer failed to prevent other employees from "directly antagonizing" him in various ways, including sitting next to him and smoking. Hentzel attempted to state a total of five different causes of action in two different complaints. The trial court sustained the employer's demurrer to all five causes of action and dismissed the complaint. Justice Grodin's disposition of the five causes of action on appeal is consistent with his analysis in *Pugh*. The court reinstated the first cause of action, firing in retaliation for protesting hazardous working conditions, as a tort cause of action based on *Petermann*. The court indicated the possibility of a finding that public

90. Finding an implied-in-fact promise not to terminate except for good cause is not dependent upon a requirement of independent consideration beyond the employee rendering services and a court need not find a reciprocal obligation of the employee not to quit his employment. Drzewiecke v. H & R Block, Inc., 24 Cal. App. 3d 695, 703-04, 101 Cal. Rptr. 169, 173-74 (1972); Littell v. Evening Star Newspaper Co., 120 F.2d 36, 37 (D.C. Cir. 1941); RESTATEMENT (SECOND) OF CONTRACTS §80. Nor is it necessary for a court to first impose and apply an implied covenant of good faith and fair dealing in order to find an implied-in-fact promise not to discharge for good reason or good cause. Lord v. Goldberg, 81 Cal. 596, 601-02, 22 P. 1126, 1128 (1889); *see Drzewiecke*, 24 Cal. App. 3d at 703-04.

91. 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982).

92. 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982). *See supra* notes 42 and 43.

policy had been violated, based on a section of the California Labor Code which declares that employees as a group have a right to seek improvements in their employment situations (i.e., through collective bargaining). This section has also been held to imply certain *individual* rights of employees. The *Hentzel* opinion stressed "the restraint which courts must exercise in this arena, lest they mistake their own predilections for public policy which deserves recognition at law."[93] After a lengthy evaluation of other state and federal statutes calling generally for a safe and healthy working environment, however, the court concluded that this cause of action contained allegations that could sustain tort liability for retaliatory discharge. Furthermore, the court upheld a cause of action for punitive damages as a right that can flow from this tort, a view which is supported by language in the *Tameny* case.[94]

The *Hentzel* court declared that the dismissal of an action for breach of an implied contract term not to terminate arbitrarily or without cause was proper, but instructed the trial court to permit the plaintiff to replead this cause of action in light of the law set forth in *Pugh*, which had not been decided at the time of the trial court proceedings. The court also reinstated a cause of action for intentional infliction of emotional distress based on the antagonism plaintiff allegedly endured as a result of his complaints about smoking.[95]

The decision in *Hentzel* sustained the dismissal of a cause of action that attempted to state a tort for breach of an obligation of good faith and fair dealing. Although the opinion contains language to the effect that this additional cause of action is unnecessary in light of the holding of the court on the first cause of action allowing a tort action for the *Petermann* type breach of public policy,[96] plaintiff's case in the trial court might be much stronger if a general tort theory arising out of a good faith and fair dealing covenant could be utilized.

Cases against insurance carriers have established a tort action for violation of an implied covenant of good faith and fair dealing. This cause of action has been extended to cases involving employee discharges by the Second District Court of Appeal in *Cleary*, but at the time of this writing, none of the other courts of appeal nor the California Supreme Court have adopted this position in any holding. In the author's opinion, such an extension is neither inevitable nor wise.

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93. 138 Cal. App. 3d at 297, 188 Cal. Rptr. at 163.
94. *See supra* note 81 and accompanying text.
95. *See supra* note 14 and accompanying text.
96. 138 Cal. App. 3d 291, 304, 188 Cal. Rptr. 159, 169 (1982).

OTHER SIGNIFICANT CASES ON THE GOOD FAITH AND FAIR DEALING ISSUE

Good faith and fair dealing has been discussed as a basis for a cause of action in other cases. Three of those cases deserve brief analysis. *Fortune v. National Cash Register*,[97] a Massachusetts case, involved the dismissal of a commission salesman who had the apparent good fortune of having a territory in which major sales to a single customer were being negotiated and consummated. The dismissal had the effect of cutting off the salesman's right to certain amounts of the commissions that had not yet accrued. The trial court asked the jury to return a special verdict answering the question: "Did the defendant act in bad faith when it decided to terminate the plaintiff . . . ?"[98] The jury answered in the affirmative; the trial court entered judgment for the plaintiff; and the appellate court affirmed without any inquiry into or comment upon the standards to be applied to answer the question posed to the jury. The court did indicate that the plaintiff's cause of action was in contract and not tort, and stated that the case should *not* be viewed as establishing a general rule that all dismissals would be subject to good faith standards.[99] The latter expression apparently was meant to be taken quite seriously because subsequent Massachusetts appellate cases have affirmed trial court decisions that distinguished the *Fortune* case on its facts,[100] and have reversed the trial court decisions that applied the *Fortune* case in a "different" factual setting.[101]

In *Smithers v. Metro Goldwyn Mayer*,[102] the Second District Court of Appeal in California sustained an award of damages for tortious breach of the implied covenant of good faith and fair dealing in the contract of a television actor. The specific conduct cited as justifying a recovery in tort was the threat to blacklist the actor by refusing to employ him in the future and attempting to induce CBS to do likewise. The court quoted with approval the trial court judge's conclusion that the alleged facts fit "to a T"

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97. 364 N.E.2d 1251 (Mass. 1977).
98. *Id.* at 1255.
99. *Id.* at 1257.
100. The courts have uniformly limited recovery to factual settings which duplicate that in *Fortune; i.e.* a firing to avoid payment of commissions on sales already completed, and have refused to apply *Fortune* to situations where the injury alleged is loss of income based on future services. *See, e.g.*, Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370, 1379 (Mass 1980); Gerald Rosen Co., Inc. v. I.T.&T., 450 N.E.2d 189, 190 (Mass. 1983); Cort v. Bristol Meyers Co., 431 N.E.2d 908 (Mass. 1982); Maddaloni v. Western Mass. Bus Lines, 438 N.E.2d 351, 354 (Mass. 1982). *But cf.* Gram v. Liberty Mutual Ins. Co., 429 N.E.2d 21 (Mass. 1981) (bad faith termination damages included lost future commissions which were only *related* to work already done).
101. *See supra* note 101.
102. 139 Cal. App. 3d 643, 189 Cal. Rptr. 20 (1983); *see supra* notes 66-69 and accompanying text.

the definition of bad faith contained in the *Sawyer* case dicta.[103]

The New York Court of Appeal was afforded an opportunity to review New York law relating to job tenure in *Murphy v. American Home Products Corp.*[104] Murphy's complaint had alleged that he was employed from 1959 to 1980 in various accounting positions leading to his last position as assistant treasurer of the company. The complaint alleged that Murphy had uncovered at least fifty million dollars in illegal account manipulations of secret pension reserves and had reported these matters to the officers and directors of the company as required by company policy. Murphy further alleged that he was fired in retaliation for reporting these matters. The trial court, however, dismissed the complaint.[105] In view of the overall direction that courts in several jurisdictions had taken in discharge cases, an outcome favorable to the employee could plausibly have been anticipated.[106] The court of appeal did not leave anyone in suspense. The first four sentences of the opinion read:

> This court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge of an employee; such recognition must await action of the Legislature. Nor does the complaint here state a cause of action for intentional infliction of emotional distress, for prima facie tort, or for breach of contract. These causes of action were, therefore, properly dismissed. Appellant's cause of action based on his claim of age discrimination, however, should be reinstated.[107]

This 6-1 decision is considered shocking by some.[108] The dissenting justice would have found no tort, but would find a contract breach of an implied covenant that "... the parties will not 'frustrate the contracts into which they have entered'...."[109]

WHITHER GOEST THE DISCHARGE CASES

When faced with uncertainty and contradictory directions in common-law decisions on a basic and critical issue such as job security, it is tempting to call out for legislation. In fact, legislation might have been appro-

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103. 139 Cal. App. 3d at 649, 189 Cal. Rptr. at 23; *see supra* note 69.
104. 461 N.Y.S.2d 232 (Ct. of App. 1983).
105. *Id.* at 233.
106. *See supra* note 22.
107. 461 N.Y.S.2d at 233.
108. Professor Cornelius J. Peck of the University of Washington School of Law was quoted in the April 18, 1983, edition of the *National Law Journal*, at page 3, saying: "The New York Court of Appeals, which is a progressive court, is going to be ashamed of this result."
109. 461 N.Y.S.2d at 241.

priate several years ago when the common law was not moving, and when indefinite employment was still terminable-at-will. As we hover on the brink of judicial solutions to these important problems, however, the wiser course of action may be for the legislative bodies to give the common-law system an opportunity to seek an appropriate solution. The legislature need not even repeal statutory enactments such as the California Labor Code that establishes or confirms the terminable-at-will norm.[110] After all, a California Code section that clearly established contributory negligence as the law of the state did not preclude the common-law adoption of comparative negligence.[111]

A common-law solution to the job security issue that creates more problems than it solves will invite a legislative response. So will a result that places burdens deemed to be excessive upon groups that have sufficient legislative clout to overturn those decisions. The courts today have an opportunity to develop new legal principles applicable to employment contracts that are better than what we inherited and which can accommodate the various affected segments of society.

A proper solution to the problem presented must be one that attains four objectives.

1. The rules that the courts evolve must provide a significant measure of job security to employees who have heretofore been unprotected. Societal attitudes toward employee rights in general, and job security in particular, have evolved significantly in the last fifty years, and the law must respond to this new perception of what is an appropriate set of basic rules.

2. Discharged employees cannot all be given an automatic right to present their cases to the juries without express guidelines to determine rights and duties. "Will all jurors in favor of firing people please stand up?" is not an appropriate approach in these cases.

3. The variables in discharge cases are myriad. Matters such as duration of employment, the level or position of the employee within the employing entity, employer practices, and the course of the relationship between the employer and the specific employee in question are significant. Any solution must accommodate and give legal effect to these variations.

4. Damages for discharges that are determined to violate the evolved standards must be reasonable under the circumstances. "Letting the employer pay" without regard to the consequences is now recognized as fueling inflation and contributing to the export of jobs by damaging the

110. CAL. LAB. CODE §2922.
111. CAL. CIV. CODE §1714 (reinterpreted by Li v. Yellow Cab Co. of California, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858, (1975)).

competitive position of domestic industries.[112] Wrongfully discharged employees deserve full compensation for damages sustained, but a finding of wrongful discharge cannot become a basis for asking jurors to determine how angry they are at the offending employer.

Adoption or retention of a contract theory as the sole remedy in the garden variety discharge case has some clear advantages. That remedy can be an acceptable solution which meets the criteria set forth above if courts will utilize the newer contract theories and rules that have been expressed in the progressive cases. Contract law need not be revolutionized to make it compatible with the perceived needs of employees, but courts must embrace some new or relatively new contract law that has already found its way into cases.[113]

(a) Parties must be permitted wide latitude to establish contract terms from all logical sources. The sources listed in *Pugh* provide a good starting point.

(b) Neither a legal nor a logical basis exists for ignoring a formal contract entered into between employer and employees. However, such contracts should be deemed to be modified when they are not consistent with actual practices, and the course of performance with respect to the employee in question and other similarly situated employees. In other words, course of performance and the practices of the shop cannot be abrogated by writings signed at the time of employment or even by written contracts re-executed periodically thereafter.

(c) Courts should exercise the standards of judicial review of contract terms that have been used in other areas in which contracts affect the public interest and are entered into by parties of unequal bargaining power.

(d) Those jurisdictions that have preserved restrictive standards relating to the admission of parol evidence must consider relaxing those standards, at least in employment cases. Conservative approaches to contract law that place undue restrictions upon contract modification must give way. Employment contracts can evolve through conduct and communications that occur after the original hiring, and this process often continues after the execution of a formal employment contract.

(e) Modern approaches to the measurement of contract damages and the determination of recoverable elements of damages must be imple-

112. Allocation of costs to the business enterprise will raise the total cost of the end product of that business. To the extent that such costs can be passed on as part of the price of the end products, this contributes to cost-push inflation. To the extent that such costs must be absorbed by the enterprise, these added costs reduce the profit margin or increase the losses of domestic business and enhance the competitive position of foreign employers. Excessive punitive damages can contribute to higher prices, loss of domestic jobs, or both.

113. *See supra* notes 54-58 and accompanying text.

mented. Some certainty is necessary since damages must not be based simply upon speculation, and the damages must be realistic. However, loss of future earnings should be provable with a lesser degree of "certainty" than is required, for example, in a wrongful death case. Employment contracts are not the only area of contract law that would benefit if contract breachers were required to pay a reasonably precise estimate of the damages that they actually caused instead of some smaller figure that can be established with precise certainty.

If courts can evolve a basis for finding employment contracts that (1) comport with the reasonable understanding and expectations of the parties to those contracts, (2) deny enforcement to terms that are the result of overreaching or abuse of bargaining position, and (3) award damages that actually compensate for the dollar value of lost expectations, then the common law will have acquitted itself well in its quest for a solution to a major social issue.